ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning the Deployment of	)	CC Docket No. 98-146
Advanced Telecommunications Capability to	)	
All Americans in a Reasonable and Timely	)	
Fashion, and Possible Steps to Accelerate	)	
Such Deployment Pursuant to Section 706	)	
of the Telecommunications of 1996	)	

REPLY COMMENTS OF HYPERION TELECOMMUNICATIONS, INC.

Hyperion Telecommunications, Inc. ("Hyperion") hereby submits its Reply Comments to various initial comments filed in response to the *Notice of Inquiry ("NOI")*, released August 7, 1998, in the above-captioned docket.

DISCUSSION

Hyperion Telecommunications, Inc. ("Hyperion"), through affiliates and wholly owned subsidiaries, operates twenty-two competitive local exchange networks in twelve states (Arkansas, Florida, Kansas, Kentucky, Louisiana, Mississippi, New Jersey, New York, Pennsylvania, Tennessee, Vermont, and Virginia). These networks currently serve forty-six cities with approximately 5,363 miles of fiber optic cable. Having reviewed the comments of several incumbent local exchange carriers ("ILECs") in this proceeding, Hyperion concludes that the ILECs are attempting to use this proceeding, as they have so many others, as an avenue to attempt to end-run their obligations to provide unbundled network elements and discounted wholesale rates, as well as to pay reciprocal compensation to CLECs for transporting and terminating their traffic -- key requirements of the Telecommunications Act of 1996 ("1996 Act") which are designed to ensure, among other things, that competition develops prior to BOC

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entry into the in-region interLATA market. The ILECs' comments suffer from the same fatal flaws from which the previous ILEC filings suffer, and should be summarily dismissed.

The ILECs have renewed their position that they should be relieved of their unbundling and wholesale obligations contained in the 1996 Act for their xDSL services under Section 706 of the 1996 Act, or in the alternative, Section 10 of the Communications Act of 1934. The Commission quite simply does not have the authority to grant the relief requested. Furthermore, even if the 1996 Act did provide the Commission with the requisite authority, the Petition should still be denied because the ILECs' position amounts to nothing more than a bald attempt to maintain their monopolistic stranglehold over an essential service offering.

The ILECs, with their monopoly bottleneck facilities, are well aware that they control virtually all of the existing copper loops that are necessary for the provisioning of ADSL services. Excusing them from the 1996 Act's obligations would leave the ILECs as the unfettered dominant provider of ADSL services in their markets, with continued exclusive domain over the copper loops to which competitors must have access to provision their own ADSL services.

Contrary to the ILECs' arguments, Section 706 should be employed to ensure that ILEC comply with their obligations under the 1996 Act, not to provide them a means of circumventing those requirements. This Commission must not be misled, and must be unwavering in the face of these blatant ILEC pressure tactics. The ILECs' request for relief in this proceeding (and similar ILEC requests in other proceedings) must be denied.

A number of ILECs are also trying to use this proceeding to circumvent their obligations to pay reciprocal compensation, by arguing that the obligation should not apply to services used to connect end users to Internet service providers ("ISPs"). Under the Commission's regulations, reciprocal compensation must be paid for transport and termination of "local traffic," which the regulations define as traffic that "originates and terminates within a local service area." 47 C.F.R. § 51.701. The Commission has defined "termination" as "delivery of [local] traffic from [the terminating carrier's end office] switch to the called party's premises." *Local Interconnection Order*, 11 FCC Rcd 16015, ¶ 1040 (1996). When a connection is made to an ISP, the ISP is the "called party." The telecommunication service "terminates" at the ISP's premises, and is "local traffic" under the Commission's regulations if those premises are within the same local service area as the caller. In recognition of this fact, the Commission has directed local exchange carriers to take to state regulators any complaints they may have regarding inadequate compensation for high volumes of traffic to ISPs. *In re Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 346.

The ILECs argue that, notwithstanding all of this, the fact that a user may ultimately interact with the ISP in a way that enables the user to access information on a server in another state makes the initial call to the ISP interstate for jurisdictional purposes, and not "local" for purposes of reciprocal compensation. This argument misses the point – because the information access that the ISP provides is an "information service," not "telecommunications." The 1996 Act expressly distinguishes between the two concepts, defining "telecommunications" as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information" (47 U.S.C. § 153(43)); while "information services" includes "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ." 47 U.S.C. §

153(20). The Commission has explicitly concluded that the Internet access services ISPs provide are information services, not telecommunications. *In the Matter of Federal-State Joint Board on Universal Service*, Dkt. 96-45 (Report to Congress) (rel. April 10, 1998) ("*1998 Universal Service Report*"), ¶ 73. *See also In re Federal-State Joint Board on Universal Service*, CC Dkt. No. 96-45, Report & Order ¶ 789 (emphasis added) (May 8, 1997).

In short, the telecommunications and information service elements of calls to ISPs are severable. The telecommunications element terminates at the premises of the ISP, and consequently is "local traffic" subject to reciprocal compensation when the caller is in the same calling area. The information service is provided separately by the ISP, is sold by the ISP to its customer, and does not constitute part of the "telecommunications service" that the ISP's customer purchases from his or her local exchange carrier.

In its recent decision in *Southwestern Bell Telephone Co. v. FCC*, No. 97-2618, *et al.*, Aug. 19, 1998, at footnote 9, the United States Court of Appeals for the Eight Circuit expressly recognized the distinction between the use of the local network by ISPs and that of IXCs:

> ISPs subscribe to LEC facilities in order to receive local calls from customers who want to access the ISP's data, which may or may not be stored in computers outside the state in which the call was placed. An IXC, in contrast, uses the LEC facilities as an element in an end-to-end long-distance call that the IXC sells as its product to its own customers.

The Court's recognition of this distinction clearly supports Hyperion's position and refutes the ILECs'.

The ILECs' position on reciprocal compensation, if followed, would also be detrimental to the public interest. If CLECs cannot recover their costs for the transport and termination of calls to ISPs, they would face enormous, uncompensated costs, since the overwhelming majority of ISP traffic is incoming, and the overwhelming majority of the incoming traffic comes from ILEC customers. The result could well be to force CLECs out of the ISP market, giving ILECs a *de facto* monopoly of this market and resulting in increased costs to ISPs and ultimately their customers. This outcome would be patently at odds with the public interest.

CONCLUSION

The Commission should decline the ILECs' invitation to abdicate its regulatory responsibilities, and should move decisively to ensure that ILECs meet their obligation to provide unbundled network elements for advanced services, to provide them at discounted rates for resale, and to pay reciprocal compensation.

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October 8, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October 1998, copies of the foregoing **Reply Comments of Hyperion Telecommunications, Inc. in Docket No. 98-146** were served by U.S. mail and hand delivery as indicated below:

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